IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 254 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

HALIMBIBI W/O ABDUL RAHIM

Versus

ABDUL RAHEMAN ABDULRAHIM

Appearance:

MR RS SANJANWALA for Petitioners

MR PV NANAVATI for Respondent No. 1

SERVED for Respondent No. 2

DELETED for Respondent No. 6

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 14/08/97

ORAL JUDGEMENT

1. This second appeal is filed against the judgment and decree passed by Extra Assistant Judge, Surat in Regular Civil Appeal No. 194 of 1977 on 22.1.1979 affirming the judgment and decree dated 31.3.1977 passed

in Regular Civil Suit No. 368 of 1971 by Joint Civil Judge (J.D.) Surat by which the preliminary decree was passed in suit filed by one Abdul Rehman for administration of the property left by Abdul Rahim Abdul Razak. The following three substantial questions were framed by this court while admitting appeal which were required to be considered in this appeal:

(1) "Whether the plaintiff's suit was barred under Section 7 read with Section 50 of the Administration of Evacuees Property Act."

(2) "Whether the suit was barred by res-judicata on account of decision between the parties in earlier suit No. 326 of 1969."

(3) Whether the gift was made under the Mohammedan Law and was void or whether it was executed under the Transfer of Property Act and was valid."

2. Learned counsel for the appellants has pressed only Question No.3 referred to above and therefore other two questions deemed to have been abandoned.

3. Facts essential for the decision of the aforesaid Question No.3 may be noticed. Parties are Sunni Muslims. Abdul Rahim Abdul Razak had married thrice in his life time. Plaintiff and respondents Nos. 1 to 4 are the children of Abdul Rahim through his first wife Aminabibi, who died in year 1943. Plaintiff and defendants Nos. 1 and 2 are the sons, defendants Nos. 3 and 4 are the daughters. The second marriage of Abdul Rahim with Jebunnisa resulted in divorce. Through this wedlock, defendants Nos. 5, 6 and 7 were born. Thereafter said Abdul Rahim married present appellant No.1 and defendant No.8. Out of this wedlock three sons and four daughters were born who are defendants Nos. 9 to 15 and appellants Nos. 2 to 8. Said Abdul Rahim died on 19.12.1968 at Surat leaving behind properties which included house property No. 2447 at Ward No. 11 and 2 rented rooms 232 to 238 situated at Limda Chowk, Surat. He was residing in the house along with his third wife and children through her, all minors. On 18.6.1968 Abdul Rahim had executed registere gift deed making gift of his property bearing Registration Entry No. 2447 in favour of the present appellants. It is this gift which is bone of contention between the parties in this appeal.

4. After Abdul Rahim died, in the first instance an administration suit No.326/69 was filed by defendant No.1

in present suit, (a full brother of present plaintiff), to which all heirs of Abdul Rahim including present plaintiff were impleaded as parties. The present appellant resisted the suit on the ground of gift in their favour. Present plaintiff migrated to Pakistan in 1947 and settled there, though was served with notice and appeared in Court on 7/7/70 and went back to Pakistan. Thereafter, before he could put in appearance again on his next visit, suit was dismissed as withdrawn on compromise. Thereafter, prsent plaintiff filed present suit for administration of estate of deceased Abdul Rahim. The plaintiff challenged the validity of gift made in favour of appellants Nos. 1 to 4.

5. The plaintiff has contended that there being no delivery of possession of the corpus of the subject matter of gift to donees, the gift is void and cannot affect his right to his share in the property as heir of Abdul Rahim. On the other hand it is the contention of appellants donees that there being unequivocal declaration in the deed that donor has delivered the possession of the property in question to donees and donees having accepted that gift in the circumstances that donees are spouse and children of the donor and were residing together, actual physical delivery of the property was not required to be made and the declaration in the gift deed about the delivery of the possession coupled with handing over of the gift deed to appellant no.1 satisfies the condition of the delivery of possession as could be made in law, making the gift complete. Any conditions in the gift deed, which are repugnant to absolute ownership of the donees are invalid and such condition cannot affect the validity act of gift.

6. On construction of the deed of gift both courts found that there was no delivery of possession of the property in question and therefore no gift in accordance with Muslim law came into existence. Therefore, the property comprised in House NO. 2447 of ward No.11 at Surat is also available for division amongst heirs of deceased Abdul Rahim.

7. Section 129 of the Transfer of Property Act dealing with the gifts provides that nothing in the chapter relating to gifts shall be deemed to affect any rule of Mohammedan law. Thus the validity of gift by a muslim has to be tested as per the personal law applicable to the muslims concerning gifts.

8. According to Mulla in his Principles of

Mohammadan Law , a `Hiba' or gift is transfer of property made immediately, and without any exchange by one person to another and accepted by or on behalf of the latter. Transfer of ownership in the property in presenti in absolute is necessary ingredient of a valid gift. Three pillars of a valid gift under Mohammedan law are declaration, acceptance and delivery of possession.

9. Prophet has said `Gift is not valid without seisin`.

10. The rule of seisin has been explained in Hamilton's Hedaya `Rule of law is that gifts are rendered valid by tender, acceptance and seisin. Tender and acceptance are necessary because a gift is a contract and tender and acceptance are requisit in the formation of all contracts, and seisin is necessary in order to establish a right of property in the gift because a right of property according to our doctors is not established in the things given merely by means of contract without seisin.``

11. Three conditions which are necessary for a valid gift under Mohammedan law has been stated by Syed Ameer Ali; (a) manifestation of the wish to give on the part of donor; (b) the acceptance of the donee either impliedly or expressly; and (c) the taking of the possession of the subject matter of the gift by the donee either actually or constructively.

12. The aforesaid opinion of Syed Amir Ali was quoted with approval by Privy Council in Mohd. Abdul Ghani v. Fakhr Jahan Begam reported in AIr 1922 PC 281 explaining that

> "object of the Mohammedan law as to gifts apparently was to prevent disputes as to whether the donor and donee intended at the time that the title to the property should pass from the donor to donee and the hand over by the donee and acceptance by the donee of the property should be good evidence that the property had been given by the donor and has been accepted by the donee as a gift."

13. The requirement of delivery of possession for a valid gift was considered to be so strict originally that property in possession of third parties whether as a usufruct or as a lessee or a mortgagee could not be made subject matter of gift being in capable of physical

delivery. However, as noticed above, the opinion of Ameer Ali that taking of possession by donee may be constructively was approved by the courts and the view which has has come to prevail is that so far as the requirement of delivery of possession as the nature of property admits. The stringent view taken in Mullick Abdool Guffoor reported in (1884) ILR 10 Cal 1112 was not adhered to by Privy Council in Mahomed Buksh Khan v. Hosseini Bibi reported in (1888) 15 Ind App 81. After noticing the facts of the case, the Privy Council said:

> "In this case it appears to Their Lordships that the lady did all she could to perfect the contemplated gift and had nothing more was required from her. The gift was attended with utmost publicity, the hibbanama itself authorises the donees to take possession and at it appears that in fact they did take possession. Thier Lordships hold under these circumstances, that there can be no objection to the gift on the ground that Shahzadi had not possession, and that she herself did not give possession at that time."

14. The aforesaid declaration of law as to requirement as to the delivery of possession to be essential requirement of valid gift and that delivery of possession can be actual physical as well as constructive found its approval by the Supreme Court in Maqbool Alam Khan v. Mst. Khodija and others reported in AIR 1966 SC 1194. The Court said :

> "The three pillars of a valid gift under the Mohammedan law are declaration, acceptance and delivery of possession.

The Court after finding that delivery of possession being an essential ingredient of a valid gift opined as to the nature of delivery contemplated for making a valid gift, in possession of third parties said :

> "That there can be valid gift of property in the possession of a lessee or mortgagee and a gift may be sufficiently made by delivering constructive possession of the property to the donee. Some authorities still take the view that a property in the possession of a usurper cannot be given away, but this view appears to be too rigid. The donor may lawfully make a gift of a property in the possession of a trespasser. Such a gift is valid, provided the donor either

obtains and gives possession of the property to the donee or does all that he can to put it within the power of the donee to obtain possession."

15. Apart from accepting delivery of constructive possession as the property is capable of another exception to Rule as to physical delivery which has been recognised by Mohammedan law are cases where donor and donee are residing in the same property at the time of gift. In such a case, the gift may be completed by same overt act by the donor indicating a clear intention on his part to transfer possession and divest himself of all control over the subject of the gift. Mulla in his book Mohammedan Law has stated the law as to delivery of possession of immovable property in para 152.15) as under:

"No physical departure or formal entry is necessary in the case of a gift of immovable property in which the donor and the donee are both residing at the time of the gift. In such a case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift."

In such case the gift may be complete by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift. In such cases, it is not considered necessary for the purpose of effecting delivery of possession that the donor must physically depart from the premises with all his goods and chatels and a formal entry be effected by the donee in the premises. In such circumstances, a declaration of the person previously possessed of the property to that effect is sufficient to put the donee into possession without any physical act or departure or formal entry.

16. This principle was enunciated by West, J in a Bombay case reported in (1884) 9 Bom. 146 that -

"When a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possession .... without any physical departure or formal entry."

17. A division bench of Calcutta High Court in Abdul Sattar Ostagar v. Abu Bakkar Ostagar reported in 1977

Cal 132 held that where a father makes a gift of a dwelling house to his sons and both the father and donees are residing in the house there is no need for delivery of possession. The rule is applied to gifts of immovable property from a wife to husband or by a husband to wife where the property is used by them for their joint residence or is let out to tenants.

18. The very important aspect of delivery of possession of the subject matter of gift has been dealt with by Syed Amear Ali in his Work Mahommadan Law as under:

> ``An acknowledgment of hiba implies an acknowledgment that all the necessary formalities were complied with. If a man were to say, ``I have made a gift of a certain property to Zaid,``such acknowledgment will be effectual also as to possession; in other words, he had delivered possession according to the law. In this view, where a gift is made in writing and the donor acknowledges at the time the deed is registered under the Indian Registration Act, that he had complied with all the requirements of the law, it would limply that possession had been duly parted with.

19. In this connection, however, two matters must be born in mind; first, the relation of the donee to the donor, and secondly, the ability of the donor to give possession within the meaning of the Mohammedan Law. For example, if the donee is an infant to all intents and purposes under the guardianship of the donor, delivery of seisin will not be required. Again if the subject matter of the gift is landed property and the donor is too ill to send for the tenants to make them attorn to the donee, his mere handing over of the title deeds together with the deed of gift ought to amount to a sufficient authorisation to take possession of the property.

20. It can now be taken to be well settled that in the case of a gift by a Mohammedan, delivery of possession of the property subject of gift is an essential condition, the delivery may be actual physical delivery of the property if it is capable of being so delivered, in case it is in possession of tenants or in possession of other parties, the constructive delivery of possession resulting in evidence of transfer of ownership right in the donee and doing of such acts by the donor that he could to put within the power of the donee to exercise power of ownership and obtain possession. In

the case of property in which donor and donee are residing together and donor continues to reside with the donee actual physical by the donor moving out in the first place, putting the donee in exclusive possession and thereafter reentering the property is not required. In such circumstance, mere declaration on the part of donor to the fact of delivery of possession to donee may be sufficient compliance with the requirement of delivery of possession making it valid gift. However, it will presently be seen in what circumstances, a declaration to that effect by the donor can be considered to be equivalent to delivery of possession of the property subject matter of gift by the donor to donee depend in each case, upon the facts and circumstances of that case.

21. In the case where the property subject to gift is in possession of a trespasser, the Supreme Court said in Maqbool Alam Khan (supra):

> "A gift of a property in the possession of a trespasser is not established by mere declaration of the donor and acceptance by the donee. To validate the gift, there must also be either delivery of possession, or failing such delivery, some overt act by the donor to put it within the power of the donee to obtain possession. If apart from making a declaration, the donor does nothing else, the gift is invalid."

22. In Humera v. Nazimunnisa (1905) 28 All 17, where a Mohammedan lady who was residing with her nephew and who was brought up by her executed a deed of gift of the nephew of the house in which they both were residing. Apart from declaration there was no physical departure and entry by the donor and donee but in view of the circumstances, when the property was later on transferred in the name of nephew and the rents were recovered in his name the gift was held to be complete without there being a formal delivery of position.

23. In yet another Allahabad case, Baldev Prasad Balgovind vs. Subratan 164 I.C. 720 where a Mohammedan gifted half of the house in favour of his daughter in law with whom he was residing at the time of making of a gift, and the declaration was made in the deed authorising the daughter in law to take possession of that house. This declaration itself was held sufficient delivery notwithstanding that there was no mutation of the names in the municipal register to that effect.

24. In Abdul Razak vs. Zainab Bi reported in AIR

1933 Madras 86, Mohammedan lady living with her son executed a deed of gift in favour of her son of the house. In the deed it was recited that possession was given to the donee. The son and the mother continued to live jointly as before in the house. Declaration coupled with the circumstance that the son had paid municipal tax after the execution of deed was held sufficient to complete the gift, even in the absence of physical delivery of the property.

25. The principle that no physical departure or formal entry is necessary in the case where there is a gift of immoveable property in which donor and donee reside together at the time of gift, has been applied with greater liberality in the case where there is a gift of immoveable property by wife to the husband or by husband to the wife which is used for their joint residence. The proposition was stated by Sir M. Sausse, C.J. in (1864)(1) Bombay H.C. 157 in Amina Bibi vs. Khatiji Bibi as cited by Mulla in his Principles of Mahomedan Law in para-153 -

> "In my opinion, the relation of husband and wife and his legal right to reside with her and to manage her property rebut the inference which in the case of parties standing in a different relation would arise from a continued residence in the house after the making of the hiba (gift), and in the husband generally receiving the rents of the chawl annexed to that house."

26. It was a case having facts like the present case wherein the husband had made a gift to the wife of a property, which consisted of a house in which husband and wife lived together and of a chawl adjoining to the house which was let out to the tenant. In the present case also, the gift consists of a house in which donor and donee reside together and part of which is in possession of the tenant.

27. In Ma Mi and another vs. Kallander Ammal AIR 1927 Privy Council 22, the property in question was gifted by husband to the wife and the husband was found to be managing the properties. On the question - whether a valid gift came into existence by noticing the fact about mutation, it was held by Their Lordships of Privy Council that -

> "It must therefore be taken that mutation was effected by Moideen himself, and in the case of a gift of immovable property by a Mohammedan

husband to his wife, once mutation of names has been proved the natural presumption arising from the relation of husband and wife existing between them is that the husband's subsequent acts with reference to the property were done on his wife's behalf and not on his own."

28. Going further in the case of Nawab Mirza Mohammad Sadiq Ali Khan vs Nawab Fakir Jahan Begam AIR 1932 PRIVY COUNCIL 13, wherein the facts were that the husband has gifted a portion of kherad property for residence when she wishes to live there and the deed declared that, `I deliver possession of the gifted property to the aforesaid second wife.` Wife did not exercise any individual acts of proprietorship over any portion of the property as to be the matter of gift during the life time of her husband. In her and her husbands absence, the property shall be occupied by the servants of the estate and repairs as were necessary were done at husbands expenses and no mutation names were made in the Government records. However, the deed had been handed over to the donee and had remained in possession of the donnee.

29. From these facts, Their Lordships to the question of delivery of possession, approving the statement of law made by West. J. referred to above, opined that,

``But in the first place, the deed contained the statement `I delivered possession of the gifted property to him to my said wife,` and this as a declaration of fact must be regarded as binding on the heirs of the donor`` In the second place, the deed of gift was handed over to the donee as soon as it registered. In the case of a gift by a husband to his wife, Their Lordships do not think that Mohammedan Law requires actual vacation by the husband and actual taking of separate possession by the wife. In their opinion, the declaration made by the husband, followed by the handing over of the deed are amply sufficient to establish a transfer of possession.

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....they think that as between a husband and his wife who are living together, it is undoubtedly a

reasonable interpretation of the requirement of the law and they adopt it is applicable to the case before them.``

30. The principle that execution of a deed of gift in favour of wife amounts to menifestation of intention of husband divesting himself of his ownership of the property in favour of the donee and the delivery of deed to his wife or someone on her behalf makes the gift complete was approved by Their Lordships of the Supreme Court in Nagraj vs. State of Mysore AIR 1964 SC 275.

31. It was a case where the parties belonged to Hanafi Sect. The husband made a gift of property including immoveable property, by registered deed, to his minor wife who had attained puberty and discretion, and the gift was accepted on her behalf by her mother in whose house the husband and wife were residing, when the minor`s father and father`s father are not alive. The deed was handed over to the minor`s mother and possession of the property was not given to a guardian specially appointed for the purpose by the Civil Court. A question was raised - whether the gift by husband to his minor wife and accepted on her behalf by her mother valid ? After referring to a large number of decisions and the text, the Court opined thus;

``The strict rule of Mohammedan Law about giving possession to one of the stated guardians of the minors is not a condition of its validity in certain cases. One such case is gift by the husband to his wife and another where there is gift to a minor who has no guardian of the property in existence. In such cases, the gift through the mother is a valid gift.

32. On the facts as noticed above, the Court said,

``The intention to make a gift was clear and manifest because it was made by a deed which was registered and handed over by Mammotty to his mother-in-law and accepted by her on behalf of the minor. There can be no question that there was a complete intention to divest ownership on the part of Mammotty and to transfer the property to the donee. If Mammotty had handed over the deed to his wife, the gift would have been complete under Mohammedan law and it seems impossible to hold that by handing over the deed

to his mother-in-law, in whose charge his wife was during his illness and afterwards Mammotty did not complete the gift. In our opinion, both on texts and authorities, such a gift must be accepted as valid land complete.``

33. Another exception to the rule of actual physical delivery is - whether a gift is to a minor by father or other guardian, in such cases, no transfer of possession is required to the donee. Where the gift is by father to minor child or by a guardian, not being father to his ward, the transfer of possession is not required inasmuch as the donor himself is in a position to accept gift made to his ward as a guardian of the donee.

34. In such cases, it may also happen that the delivery of possession of a gift to minor will be effected by donee to a person specified by donor. The acceptance of gift by such person specified by the guardian, to which father accepts or acquires arrangement of the gift is valid. Where a gift is made by father specifying another person for the purpose of accepting delivery of possession on behalf of minor, then acceptance of gift by a specified person of the property fulfills the conditions of gift inasmuch as of acceptance of gift by the specified person with the expressed direction of the father, the guardian of the minor.

35. The rule of Mohammedan law in connection with the gift to minors was expressed by the Madras High Court in case of Azeshabi vs. Kathoonbi AIR 1966 MADRAS 462 as under :

``The rule of Mohammedan law that delivery and possession should be effected to the father as the guardian and the latter should accept the gift can have no application to a case in which the donor specifies some other person as the guardian to take possession and accept the gift on behalf of the donee. So long as the father accepts such an arrangement and acquiesces in the same, it must be held that there has been sufficient compliance of the rule of Mohammedan law.``

36. So far as the question of delivery of possession with essential ingredients of completing the valid gift is concerned, the law recognised that there should be delivery of such possession as the subject of gift is acceptable. Thus, making it clear, that taking of possession of the subject matter of the gift by the donee

may either by actual or construction, where donor and donee both resides in the property which is the subject matter of gift, the continuance residence of donor is not in derogation of the gift and in such cases, where donor and donee are spouses and the property is being used for their joint residence, physical departure of donor and formal entry by the donee is not essential nor actual physical handing over of the possession where the property is let out to tenants is necessary. In such cases, mere declaration where the gift deed is in writing, in the deed that the possession has been handed over to the donee and the deed has been delivered to the donee, the possession becomes complete.

37. As has been noticed above, the Supreme Court has after taking into consideration texts and earlier precedents has approved the practice that declaration of delivery of possession in the registered deed coupled with delivery of such deed to the donee to in person who could accept the delivery of deed where donee is minor, on donee`s behalf, the delivery is sufficient to constitute a valid gift in the eye of law.

38. In the present case, the facts are that there is a declaration of gift by the donor through a registered deed and also there is the acceptance of that deed by the donee, the wife of the donor for herself and on behalf of minors. In that view of the matter, so far as the ingredients of firstly menifestation of wish of the donor to give, secondly, acceptance of the gift by the donee must be held to be complete. It may further be noticed that the parties to the transaction of gift are that the donor is husband, donees are wife and minor children of the donor through the donee wife and the delivery of possession of the property is declared to be given to the wife on her own behalf as well as on behalf of the minor sons in the deed itself with a stipulation that the wife is entitled to get the property mutated in the name of donees and further right to demise the property. However, that would be subject to the consent by the donor during his life time. The deed contained other conditions as well, to which we shall advert to presently.

39. It is on the basis of these conditions which has been urged that even if delivery of the subject of gift is held to have given to the donees, the conditions subject to which gift has been made militates against transfer of any property during life time of the donor and it makes the gift of property to take effect in future which is void.

40. The precise contention of the respondents emanates are from the following conditions narrates in the deed of gift, an English translation of which has been supplied by the learned counsel for the appellant.

CONDITIONS :

1. Till my life my right of living in the said property is reserved permanently. Moreover, I have reserved my right to take (collect) rent from the tenants, and to keep and change the tenants and to take the possession from them, till my life.

2. During my life, you cannot mortgage, sale or gift etc. arrangement of the following mentioned property without my consent.

3. If any of my gentleman progency out of you is minor and if I am not alive then, you cannot make any arrangement of mortgage, sale or gift of the property. It means after all being the major after my life, you are the owner attorney to make arrangement for the same.

4. I have to pay all the taxes relating to the said property till my life (till I am alive) and I have to make arrangement of all types like repairing and taking care etc.

5. I have kept a permanent facility of a room in the said property for my four daughters mentioned above and in that way, you have to keep it permanent and whenever any arrangement like sale, gift etc. of the said property is made, at that time, the arrangement should be made keeping permanent right of daughters of residing.

41. According to the learned counsel for the respondents, these conditions manifest the intention of the donor not to divest himself of the proprietary interest and control of the property as owner during his life time and therefore, notwithstanding that delivery of possession, as the property is capable of, is accepted, no valid gift of corpus has taken place. Divesting of ownership is an absolute necessity and unexceptionable. In order to bring into existence a valid gift under the Mohammedan law, there must be divesting of the ownership of the donor in presenti. Where the donor continues to

exercise rights of ownership over the property inconsistent with the transfer of proprietary interest, the gift has to be held as inoperative. However, in examining this question, it would be pertinent to keep in view the difference between contingent gift and gift with conditions attached to it and the effect of conditions on which gift has been made on the validity of the gift.

42. In para-164 of Mullas principle of Mohammedan Law, it has been stated that -

> ``When a gift is made subject to a condition which derogates from the completeness of the grant, the condition is void, and the gift will take effect as if no conditions were attached to it.``

In para-163, it has been stated that -

> ``A gift cannot be made to take effect on the happening of a contingency

43. It will be illuminating to refer in same detail how Syed AmeerAli had dealt with this aspect in his tretise on Mahommadan Law. It has been stated that there is a great difference between contingent gift and the gift with conditions attached to them. The former gifts which are made dependent for their operation upon the occurrence of certain contingencies are void according to all the schools. Whilst with regard to gifts with conditions attached to them, there exists a certain divergence between the Shiahs and the Hanafis. According to Hanafi Law, any derogation from the completeness of the gift is null, and if the intention to give to the donee the entire subject matter of the gift be clear, subsequent conditions derogating from or limiting the extent of the right would be null and void. Accordingly, under the Hanafi law, whilst the gift is valid, the condition is void. Under the Shiah law, if the condition is subsidiary to the gift, both the gift and the conditions are valid. In practice, there is no difference whether the gift depends on the condition attached, or whether the condition is only subsidiary. In both cases, both gift and condition are valid.

44. Under the Hanafi Law, when it is clear that the intention is to make to A a gift of the corpus of a thing, and it is conditioned that he should take a limited interest in it or take it only for his life, the condition would be void, and the gift would take effect absolutely. Similarly, if a man were to give a piece of

land to another on the condition that he should give to him in perpetuity the whole produce of the land, the condition would be bad, for, in these cases, the condition defeats the object of the gift, in other words, although it purports to transfer the property to the donee, in one case it cuts down his interest, and in the other burdens him with a perpetual trust.

45. But even under the Hanafi Law, only such conditions are invalid as render the gift nugatory or defeat its very purpose. The illustration given in the Fatawai Alamgiri, which are in accord with the social conditions of the times, leave no room for doubt as to the meaning of the jurists. All our masters have declared that when a gift is made and an invalid condition is attached, the gift will be valid and the condition will be void.

46. Where the condition imposed on the donee is such as to defeat the whole purpose of the gift, for although the transaction purports to be a complete transfer of the entire thing, the right is so limited that it renders its enjoyment in some cases nugatory, in others only gives the corpus in part. And therefore, effect is given to what is supposed to be the primary object, viz. the gift is held to be valid whilst the condition is avoided. This, in substance, is the meaning of the jurists.

47. The instances referred to are that - ``If a house is given to another on the condition that a part of it should be given back to the donor or that the donee should give something in return for it, (1) the gift would be valid and the condition void, so it is stated in the Kafi. The rule in all these cases is that in contract where (complete) seisin is a condition, nugatory provisions do not avoid the contracts but are themselves rendered void, such as gift or pledge.

48. It has been concluded on analysis of various principles in the following words.

> ``An analytical examination of the principles with due regard to the main purpose of the Mussulman Law, shows that where the intention is clear to transfer the entire right of property in the corpus of the gift, a mere reservation of interest in its rents and issues, or any profit accruing therefrom or a subordinate share in its enjoyment does not affect the validity. And this view is not restricted to the case of a minor

donee.``

``As a general rule, it may be stated that, where the intention to make an absolute transfer in present of all proprietary right is clear, any condition which derogates from the immediate completeness of the gift is regarded as void. Where the condition, however, may be given effect to without in any way interfering with or detracting from the immediate completeness of the gift, or rather the immediate transfer of the right in the substance of the gift, the condition as well as the gift are valid. If a man were to give absolutely his property to another and place the donee in possession thereof, so far as its nature admits, to use the language of the Majm`aa-ul-Anhar, with the condition that the whole or a portion of the income should be given to him, the donor, or to any body else during his life time, such a reservation or condition would not prevent the property vesting immediately in the donee.

A gift does not become void on account of an invalid condition. Accordingly, when an arrangement is entered into between a husband and wife in regard to their respective rights, and property is conveyed thereunder by one to the other, it takes effect as a gift and does not become void for any invalid condition. ``But sale, mortgage, and lease would be void for invalid conditions.``

49. Keeping in view the aforesaid principles, if the deed of gift is to be examined, it is to be noticed that there is no dispute between the parties that the subject matter of gift vis. house property was the absolute property in the absolute seisin of the donor Abdul Rahim Abdul Razak (for short `donor`). That is to say, he was in a position to make a gift of the property. A part of the property was used by the donor for residence and he was residing therein with his third wife Halimabibi and donors progeny through her constituting three minor sons and four minor daughters. The gift was declared in favour of donor`s wife Halimabee and three of his minor sons. The deed was executed in favour of Halimabibi, wife of Abdul Rahim (donor), band master describing it as a gift for herself and as guardian of minor sons of donor. After describing the family circumstances and the purpose of gift, the donor declares that -

``I have given you the gift of the following mentioned property including the total building on the land, all the goods in it, windows, doors, door frames etc., including the rights of concerned from sky to very deep layer of the earth, and my right to rent and possession from the tenants therein, and all the moveable properties in it, and water pipe light etc. in it for Yavatchandra Diwakaro.``

50. Thus, there is declaration of intention to transfer in absolute the dominion of corpus in favour of donor`s wife as one of the donees as well as acting as guardian on behalf of three minor children of the donor. Thus, for the purpose of accepting the gift, father has specified the mother as a person to accept the gift on behalf of the minors. It was further declared in the gift deed that -

``Today, I have given you the possession of the following mentioned property, as owner, depending upon the aforesaid conditions, and I have made you complete and independent owner, reserving my aforesaid rights. From today, no rights as a owner have been kept except my aforesaid rights. Even then, henceforth if I or any or my heir/representative shows (claims) any right, then that will be cancelled by this writing (agreement).``

Hence, from today depending upon the aforesaid conditions, you and your heir/representatives have right to make arrangement like mortgage, sale gift of the said property as an owner and you may give it on rent also and you may take possession.``

51. It was further declared in the body of the gift that -

``On the basis of this gift agreement, believing my consent, get the following mentioned property in your name in the office of the Surat City Survey and office of the Mahanagar Palika. I have to give necessary (required) signature and consent etc.``

52. Further there is no dispute that the gift deed was duly registered and was handed over to the donee Halimabibi. Actual mutation in the name of donee has taken place after the death of donor. On this precinets

if we are to examine the effect of conditions mentioned above, whether the same results in retracting from the intention of the donor to make an absolute gift of the property during his life time. Keeping in view the fact that the donor was the father and was residing with the donees who are his wife and minor children, the reservation of right to reside in the house alongwith the donees does not detract from intention of making a valid gift during the life time nor detract from delivery of possession in the manner it was capable of delivery of the property where the donor and donees reside in the same premises.

53. Likewise, the portion of the property being in possession of the tenant was incapable of being physically offered and could only be symbolically delivered to the donees. The delivery of possession in such cases is presumed where the deed of gift is registered and is handed over to the donees it manifesting an unequivocal intention to make a gift. The mere reservation of right to collect rent in the circumstances do not detract from the intention to make absolute gift of corpus in favour of the donees, inasmuch as firstly, it has not been stated in the condition that donor reserves right to collect rent and to keep and change tenants and to take possession therefrom in his own right. It cannot be lost sight that, out of the four donees, three were his own minor children and as natural guardian of theirs, he was entitled and obliged to manage the property of his wards and as a husband of his wife, he was also entitled to manage the property on her behalf. Reserving right to collect rent and deal with tenants is compatible with managerial function of husband and guardian of minor children.

54. Moreover, as noticed above, the donor has also made unequivocal declaration in his deed that henceforth, the donees have a right to enjoy the property as an owner which include the rights of the donees to give it on rent and to take possession. Therefore, the condition of reserving right to collect rent and to keep and change the tenants and to take their possession, in the circumstances can only relate to manifestation of the intention of the donor to continue to manage the property on behalf of the donees who were either wards of the donor and/or the wife whose property he was otherwise entitled to manage under personal law. He has not reserved any right to collect the rent and to take possession from the tenants in derogation of the rights of the donees in whose favour, the gift was intended.

55. The condition no.2, which makes the right of alienation by way of mortgage, sale or gift or any other arrangement by the donees subject to the consent of the donor also does not derogate from the transfer of absolute ownership, inasmuch as the right to transfer the property in any manner has not been reserved by the donor to himself. The right to alienate the property has been manifested to vest in the donees not only in clause (2) of the condition, but also in latter declaration that the donees have right to make arrangements like mortgage, sale, gift of the said property as owner. In the circumstances, this condition also in my opinion does not militate against the transfer of absolute ownership of corpus.

56. The condition no.3 too, in my opinion, refers to situation after the donor dies and is not reservation of any right in favour of the donor militating against the transfer of absolute ownership of corpus in favour of the donees in presenli. The condition inhibits the right of wife, one of donees, to alienate property in future during minority of other donees, sons of donor and the donee wife. That is not a condition concerning reservation of any right of ownership unto donor, but if at all inhibits against exercise of right of absolute ownership after the property vests in donees.

57. Likewise, condition no.5 does not militate against the transfer of property in favour of the donees by way of gift by reserving ownership right unto the donor in the said property. The right of residence reserved in favour of the four daughters of the donor, militating against the absolute enjoyment of property vesting in the donees. If the condition is to be held against exercise of right of ownership by the donees, for the benefit of third parties, the condition would be invalid and not the gift. But, a condition on exercise of absolute right of transfer during the minority of any one of co-owners in whom the ownership has vested on gift having taken place, cannot be considered a condition on which gift depends. But is a subsidiary conditions as a clog on right of donees, on property being vested in them.

58. These conditions in fact can only operate on property having vested in the donees, that they could exercise their right of transfer or alienate the property in any manner subject to the consent of the donor. Thus, condition is subsidiary or subsegment to gift and does not make the gift dependent upon it. All the conditions are not conditions preceeding the gift. Even if such

condition were held to be militating against exercise of such absolute right of ownership by the donees as per Hanifa School, to which both the parties belong, the gift would be valid and the condition would be void.

59. It may be made clear that, since the suit is not for enforcement of conditions or declaration of such conditions to be void, I am not dwelling upon deciding the conditions to be invalid or valid, in this case, as the question does not arise for consideration. The conditions are examined merely from the point of view whether they militate against the gift having come into operation at all.

60. Much emphasis has been laid on donor keeping with himself obligation to pay taxes of property during his life time under condition No.4. Suffice it to say that the payment of taxes by donor or donees may be one of the factors for the purpose of determining the question whether donor has intended to pass ownership rights to the donees or was in fact keeping ownership rights with himself, but is not the only and conclusive circumstance. Its effect has to be considered in and alongwith all attending circumstances alongwith other conditions of the gift. When the donor has unequivocally declared in favour of rights of the donees to get the property mutated in donee`s name in records in presenti and it is also declared that donees have right to alienate the property in any manner, albeit subject to consent of the donor during his life time without reserving any such right to himself, and it is also declared that the donees have right of ownership to give the property, subject matter of gift, on rent and take possession from the tenants, the fact that the authority to collect the rent and deal with the tenants during his life time, has also been kept with donor himself, keeping in view the factum of the three minor donees being ward of the donor, the declaration of donor`s intention to bear the burden of taxes during his life time, does not stand against the unequivocal intention of donor to make an absolute gift of corpus in favour of the donees, and on delivery of possession by making such declaration in the registered deed and deliverying the deed to one of the donees on behalf of herself and minor donees, the gift is complete.

61. In the present case, a declaration of the intention of gift by the donor is made through a registered deed, the acceptance of the gift is manifested by acceptance of registered deed by the donee applicant No.1 for herself and on behalf of minor donees and the

delivery of possession of subject matter of the gift, the house property was made in the manner it was capable of being delivered. Spouse and minor children, the donees and the donor are residing together and donor continues to reside with them. In such circumstances, actual departure and re-entry by the donor was not required. Though no delivery of possession is required in case of gift from father to minor children, in fact, mother having been specified as a guardian for the purpose of acceptance of possession, with whom the donor is residing, the delivery of registered deed of gift to the mother for herself and on behalf of her minor children completes the delivery of possession of the subject of the gift so far as the residential portion is concerned and the delivery of the possession of the portion occupied by the tenant, is also manifested by declaration of the donor that the donees are entitled to get the property mutated in their names, to give the property on rent and take possession from the tenants. Moreoverr, the act of delivery of possession of one property cannot be splitted.

62. Therefore, I have no hesitation in concluding that, on true construction of the documents of gift, all the essential conditions of a valid gift under the Mohammedan Law have been satisfied and the gift must be held to be complete. It being not a contingent gift or a gift of a life interest or gift of property on happening of certain event, nor of the property in futuro, the possession of corpus being made the gift is complete. Any condition, even if it were in derogation with the absolute enjoyment of rights of ownership by the donees, the conditions must be held to be void and not the gift.

63. As a result of the aforesaid discussion, it must be held that the lower Courts erred in coming to the conclusion that there was no delivery of possession of the property to complete the gift by misconstruing the documents etc.and not appreciating the true input of rules of Mahommadan Law as applicable to present case. The appellants are entitled to succeed.

64. In the result, this appeal succeeds. It is held that the gift of the property in question being complete in favour of the present appellants No.1 to 4 by the deceased Abdul Rahim Abdul Razak during his life time when the declaration of gift was made through a written document which was duly registered and handed over to the wife Hanifabibi and the property having vested in the present appellants, the widow of Abdul Rahim Abdul Razak appellant No.1 and the sons appellants no.2 to 4, the

property was not available for being administered on his death for the benefit of his other heirs. Therefore, the plaintiffs` suit for administration of the property in question must fail. Accordingly, decree passed for administration of the property for the benefit of heirs of deceased Abdul Rahim Abdul Razak to the exfed it relate to property under gift is set aside. In the facts and circumstances of the case, there shall be no orders as to costs of this appeal.

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